

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

DERRICK HOWARD, )  
v. Plaintiff, ) Case No. 4:17CV2322 SNLJ  
DAVID JAY BERNSTEIN, et al., )  
Defendants, )

**MEMORANDUM AND ORDER**

Plaintiff Derrick Howard claims that his attorneys, the defendants, committed legal malpractice, negligence, breach of fiduciary duty, and fraudulent misrepresentation by failing to properly represent him in a prior lawsuit he brought in this Court. Plaintiff was granted *in forma pauperis* status, and the defendants were served on March 26, 2018.

On April 12, 2018, defendant David Jay Bernstein filed a motion for an extension of time to answer the complaint (#16). The motion was granted, and the answer was due on May 13, 2018.

No answer was filed on May 13, and none has been filed at all on behalf of any of the six defendants.

On June 25, 2018, plaintiff filed a “motion to compel service pursuant to Fed. R. Civ. P. 5(a)(1)(A)-(E).” (#18.) Plaintiff states that the defendants have not been serving plaintiff with its filings or pleadings.

On July 16, 2018, apparently realizing there had been no filings at all, plaintiff moved for entry of default (#19) against “defendants David Jay Bernstein, et al.” The

clerk entered default against only the defendants whose names included the name “Bernstein” – David Jay Bernstein, David Jay Bernstein, P.A., and Bernstein & Weintraub. (#20.)

The next day, on July 21, 2018, defendant David Jay Bernstein filed a motion on behalf of himself, David Jay Bernstein, P.A., Bernstein & Weintraub, and Federal Legal Center, seeking to set aside the clerk’s default (#21). Notably, although Bernstein moved on behalf of Federal Legal Center, no entry of default has been made against it. Bernstein makes no statements about defendants Perry Orlando or James Murphy, who have been served but also failed to file timely answers.

Plaintiff filed a response in opposition on August 13, 2018. Plaintiff asserted, however, that he still has not received copies of numerous filings in this case, including the motion to set aside and other filings by defendants and orders from this Court. Plaintiff said he learned about the entry of default and the motion to set aside the default from a friend outside the prison who has a PACER account. The Court concluded that because neither its mail nor Bernstein’s mail had been reaching plaintiff, that there was a problem with mail receipt or distribution at the federal prison in which plaintiff is incarcerated. The Court thus ordered documents to be re-sent to plaintiff so that plaintiff could respond appropriately to the defendants’ motion to set aside the clerk’s default. The Court allowed plaintiff until September 18 to file a response in opposition to the motion to set aside the entry of default.

Plaintiff filed a renewed motion for default judgment (this time naming all the defendants individually) on August 27, 2018, and a response to the motion to set aside the default on October 1, 2018. No defendant has responded to those filings.

This case presents a peculiar set of circumstances. It appears that defendant Bernstein, on behalf of himself and his firms (Bernstein & Weintraub, David Jay Bernstein, P.A., and Federal Legal Center), intends to file an answer, but he was waiting for this Court to set aside the entry of default. Those defendants state that Bernstein suffers from a rare neurological disorder and that his impairments and staff error resulted in the missed deadline. He seeks 30 days from the date of an order setting aside the default in which to respond to the complaint. The Court will grant the motion. Entry of default will be set aside for David Jay Bernstein, David Jay Bernstein, P.A., and Bernstein & Weintraub. Those entities and the Federal Legal Center will have 30 days in which to answer the complaint.

Remaining then are the two individual defendants who have not entered any sort of appearance in this case. Plaintiff's renewed motion for entry of default remains active as to defendants Orlando Perry and James Murphy, both of whom were served in March 2018.

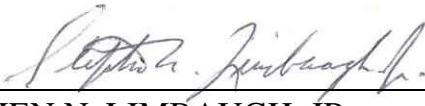
Accordingly,

**IT IS HEREBY ORDERED** that defendants David Jay Bernstein, David Jay Bernstein, P.A., and Bernstein & Weintraub's motion to set aside entry of default (#21) is **GRANTED**.

IT IS FURTHER ORDERED that defendants David Jay Bernstein, David Jay Bernstein, P.A., Bernstein & Weintraub, and the Federal Legal Center will have 30 days from the date of today's order in which to file their answer to the complaint.

IT IS FINALLY ORDERED that plaintiff's motion to compel ruling (#27) is DENIED as moot.

Dated this 15th day of February, 2019.



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STEPHEN N. LIMBAUGH, JR.  
UNITED STATES DISTRICT JUDGE